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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of *Ex Parte* Communication, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28; *Framework for Broadband Internet Service*, GN Docket No. 10-127

Dear Ms. Dortch:

Comcast has long supported the Commission's open Internet policy, from the original *Internet Policy Statement* in 2005, to the crafting of the Commission's 2010 open Internet rules, and including the order approving our acquisition of NBCUniversal. Comcast also has supported the Commission's proposal to adopt legally enforceable transparency, no-blocking, and anti-discrimination rules in this proceeding and has urged the Commission to do so pursuant to its authority under Section 706 of the Telecommunications Act of 1996 (the "1996 Act").¹ While fully supporting and advocating for strong and enforceable open Internet rules, Comcast has opposed proposals to reclassify broadband Internet access service as a Title II "telecommunications service."² The record in this proceeding overwhelmingly demonstrates that reclassification not only would be harmful, but also is completely unnecessary and would not accomplish the Commission's core public interest objectives in this proceeding. Comcast's support for strong net neutrality rules is entirely consistent with our opposition to Title II; such an approach represents the best path by far to preserving Internet openness while ensuring continued investment and innovation in the dynamic and evolving broadband marketplace.

The public discourse on open Internet issues has now reached a fever pitch. Emotion and hyperbole are substituting for facts, and the highly politicized environment risks impeding sound

¹ See, e.g., Comments of Comcast Corp., GN Docket Nos. 14-28, 10-127, at 13-26 (July 15, 2014) ("Comcast Comments"); Reply Comments of Comcast Corp., GN Docket Nos. 14-28, 10-127, at 4-9, 26-36 (Sept. 15, 2014) ("Comcast Reply Comments").

² See Comcast Comments at 42-67; Comcast Reply Comments at 9-26.

legal reasoning and wise policy choices. To establish open Internet rules that are “right” and “sustainable,” which the Chairman recently reiterated as the agency’s objectives,³ the Commission must break through this morass and produce an order that is based on the facts, the law, and well-reasoned policy. The relevant facts are as follows:

- The bipartisan decisions that resulted in light-touch regulation of the Internet for two decades paved the way for American ISPs to invest in some of the greatest broadband networks anywhere in the world.
- There is no factual basis for revisiting these prior determinations. Broadband Internet access service continues to meet the definition of an “information service” set forth in the Communications Act of 1934, as amended (the “Communications Act”), and the broadband marketplace is more competitive than ever.
- Consumers have benefitted greatly from the current regulatory approach, which has resulted in rapidly increasing speeds and decreasing prices on a per-Mbps basis.
- The record before the Commission is devoid of any evidence that would justify a wholesale revision of the regulatory regime for broadband Internet access services.

Chairman Wheeler has stated repeatedly that “all options are on the table” in this proceeding, including the possibility of reclassifying broadband Internet access service, or some component thereof, as a Title II telecommunications service.⁴ Further, President Obama recently expressed support for reclassification,⁵ and there are widespread reports that the Commission is seriously considering this approach.

But the record in this proceeding and the marketplace experience of the past decade establish unequivocally that Title II regulation, which was designed to address an industry dominated by a single monopoly telephone service provider, is not necessary to protect consumers or to advance the public interest in today’s dynamic broadband marketplace. The *Verizon* court’s affirmation of the Commission’s broad authority under Section 706 to adopt open Internet regulations provides additional support for the conclusion that the provisions of Title II are not needed to protect the open Internet. In fact, Title II does not even provide a valid

³ Chairman Wheeler noted less than two weeks ago that his three goals for reform are “quickly, right, sustainable.” Mario Trujillo, *FCC Chief Hopes to Move Quickly on Net Neutrality*, The Hill, Dec. 11, 2014, available at <http://thehill.com/policy/technology/226840-fcc-chairman-mum-on-net-neutrality-timeline>.

⁴ See, e.g., Remarks of Tom Wheeler, Chairman, Federal Communications Commission, to the National Cable & Telecommunications Association (Apr. 30, 2014).

⁵ See White House, *Statement by the President on Net Neutrality*, Nov. 10, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality> (“Obama Nov. 10 Statement”).

basis for rules banning paid prioritization – the objective that has most animated this proceeding.⁶

As noted by many parties in the record, broad forbearance does not fully alleviate the marketplace risks of regulating broadband Internet access services under Title II, nor can forbearance be invoked without significant legal risk. Nevertheless, if the Commission chooses to reclassify and depend on forbearance to narrow the effect of that ruling, it should (and has the authority to) forbear *fully* from Title II⁷ on a nationwide basis, and it can rely on Section 706 to achieve the net neutrality rules that are the only legitimate, noticed objective of this proceeding.

The Commission’s broad authority to adopt open Internet regulations under Section 706 makes it unnecessary to rely on the substantive provisions of Title II to achieve open Internet protections. If the Commission reclassifies broadband Internet access service as a Title II service, the *Verizon* court’s reason for invalidating the “no unreasonable discrimination” and “no blocking” rules will evaporate. This alone makes it unnecessary to rely on Title II’s substantive provisions, including Sections 201 and 202, and bolsters the case for forbearance under the criteria set forth in Section 10 of the Communications Act for all of Title II’s requirements. Importantly, there is ample Commission precedent for granting broad relief from Title II for a previously unregulated service. Even proponents of reclassification have stated that granting forbearance in this context is “easy.”

Comcast submits this written *ex parte* to address the points laid out above in greater detail. In particular, this letter (1) further calls into question the legal and policy basis for a Title II classification for broadband Internet access services; (2) makes clear that proceeding down a reclassification path would be even *more* precarious in the absence of a grant of broad, nationwide forbearance from enforcement of all Title II obligations and restrictions, including those in Sections 201 and 202; (3) explains that the Commission has clear authority to grant such relief to broadband providers in a streamlined manner; and (4) demonstrates that such relief is justified under the Section 10 criteria.

I. The Performance of the Broadband Marketplace Under the Existing Regulatory Regime Demonstrates That Title II Regulation Is Not Necessary to Protect Consumers and Would Present Serious Legal Risks.

The Commission has long recognized the deleterious effects that Title II regulation would have on the broadband services marketplace. Shortly after the 1996 Act was enacted, the Commission issued a report cautioning that classifying information service providers as

⁶ See, e.g., Comcast Comments at 50-54; Comcast Reply Comments at 30-31; Statement of Chairman Wheeler, Hearing Before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, “Oversight of the Federal Communications Commission,” Video at 44:56 (May 20, 2014), [available at http://energycommerce.house.gov/hearing/oversight-federal-communications-commission-0](http://energycommerce.house.gov/hearing/oversight-federal-communications-commission-0) (“There is nothing in Title II that prohibits paid prioritization.”).

⁷ See *infra* at 25 & n.107, detailing the scope of the requested forbearance.

telecommunications carriers, and thus presumptively subjecting them to the broad range of Title II constraints, “could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry.”⁸ Shortly thereafter, Chairman Kennard forcefully explained that “regulation has costs” and that “to go to the telephone world . . . and just pick up this whole morass of regulation and dump it wholesale on the cable pipe” would “not [be] good for America.”⁹ When a court sought to apply Title II to cable modem service, the Commission and the Justice Department urged Supreme Court review, warning that “[t]he effect of the increased regulatory burdens” resulting from Title II regulation “could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas.”¹⁰

The wisdom of the light-touch regulatory policies adopted under Chairmen Kennard, Powell, and every other chairman since has been validated by experience. The broadband industry’s unprecedented expansion over the past ten-plus years has produced vast deployments of broadband infrastructure throughout the nation, continuous increases in transmission speeds, and constant reductions in the per-Mbps price of broadband. These enormous consumer benefits have been generated under a regulatory regime that is the antithesis of the intrusive framework embodied in Title II. In light of this long history of an efficiently functioning marketplace that benefits consumers and economic development, there is no plausible basis for a claim that Title II regulation is needed to protect consumers or to further the Commission’s public interest objectives.

The broadband industry’s remarkable accomplishments have been well-documented and need not be recounted in detail here. Briefly stated, consumers have enjoyed ongoing increases in the speed of broadband transmissions over the past decade as top speeds have increased by a stunning 1,500 percent.¹¹ This trend is continuing today as Comcast and other providers have announced the deployment of services with gigabit transmission speeds in areas throughout the

⁸ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 46 (1998).

⁹ “Consumer Choice Through Competition,” Remarks by William E. Kennard, Chairman, FCC, at the National Association of Telecommunications Officers and Advisors, 19th Annual Conference, Atlanta, GA, at 5 (Sep. 17, 1999).

¹⁰ Petition for a Writ of Certiorari by U.S. Dept. of Justice and FCC, *FCC v. Brand X Internet Servs.*, No. 04-281, at 26 (Aug. 27, 2004), available at <http://transition.fcc.gov/ogc/documents/filings/2004/BrandX.pet.final.pdf>. The agencies also said that reclassification would threaten to undermine “one of the central objectives of federal communications policy since 1996” – “[e]ncouraging the deployment of broadband services throughout the Nation.” *Id.* at 24.

¹¹ See John Sununu and Harold Ford, Jr., *Don’t Make the Internet a Public Utility*, SFGate, May 14, 2014, available at <http://www.sfgate.com/opinion/openforum/article/Don-t-make-the-Internet-a-public-utility-5478946.php>.

United States.¹² Equally important for consumers, these rapid increases in transmission speeds have been accompanied by consistent decreases in the prices they pay per Mbps. As Comcast previously has noted, since 1996, the speed of the connections offered under the company's standard broadband Internet service tier has increased by over 900 percent, while the price that consumers pay for this service on a per-unit of speed basis has declined by at least 87 percent.¹³ Moreover, as Dr. Mark Israel explained at length in a declaration filed with the Commission, the U.S. broadband industry continues to become more competitive and differentiated.¹⁴ Absent a change in Commission policy, these ongoing marketplace forces will lead to even higher transmission speeds and even lower per-unit prices, both of which will further the public interest and benefit the nation's consumers.

Put simply, the success of the Commission's light-touch broadband policies is undeniable. The sharply contrasting experience of European consumers, *where service providers are subject to a common-carrier type regime*, is instructive. The improvements in speed and reductions in price that those consumers have enjoyed have been less substantial than their American counterparts. For example, 85 percent of the U.S. population currently has access to broadband networks capable of providing 100 Mbps or faster speeds.¹⁵ A recent study estimated that only slightly more than half of European households "can access speeds of 30 Mbps or greater."¹⁶ Similarly, "investment in telecommunications networks in the US per capita is more

¹² See, e.g., Greg Avery, *Comcast Eyes Gigabit Internet for Denver Area, Too*, Denver Business Journal, Sep. 26, 2014, available at http://www.bizjournals.com/denver/blog/boosters_bits/2014/09/comcast-eyes-gigabit-internet-for-denver-area-too.html?page=all (reporting that Comcast "will begin testing technology capable of 1 gig to 10 gig Internet speeds in a few months, and then offering it broadly as soon as possible"); Edmund Lee, *Cox Plans Faster Web Service in 2014 to Challenge Google*, Bloomberg, Apr. 30, 2014, available at <http://www.bloomberg.com/news/2014-04-29/cox-plans-faster-web-service-in-2014-to-challenge-google.html> (reporting that "Cox is joining AT&T Inc. and Google Inc., which are racing to introduce fiber-optic broadband services with speeds as fast as 1 gigabit a second in cities across the U.S.").

¹³ Comments of Comcast Corp., GN Docket No. 12-228, at 12 (Sept. 20, 2012).

¹⁴ See Mark A. Israel, "Implications of the Comcast/Time Warner Cable Transaction for Broadband Competition," attached as Exhibit 6 to Applications and Public Interest Statement, MB Docket No. 14-57 (filed Apr. 8, 2014).

¹⁵ Roslyn Layton, *When It Comes To High-Speed Internet, The Grass Isn't Greener In Europe*, Forbes, Feb. 7, 2014, available at <http://www.forbes.com/sites/realspin/2014/02/07/when-it-comes-to-high-speed-internet-the-grass-isnt-greener-in-europe/>.

¹⁶ *Id.*; see also, e.g., Prof. Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (June 2014), available at <https://www.law.upenn.edu/live/files/3353-us-vs-european-broadband-deployment-summary> ("Yoo Study") (finding that only 52 percent of E.U. households have access to broadband networks delivering more than 25 Mbps).

than 50% higher than in Europe.”¹⁷ As the European Commission declared last year, “Europe is losing the global race to build fast fixed broadband connections. . . . [T]elecoms companies are under-performing, other businesses are losing competitiveness and frustrated consumers are stuck in the internet slow lane.”¹⁸ Indeed, after more than a decade of European Union common-carrier-style regulation of ISPs, the United States now leads Europe in fiber and LTE deployment, investment, download speeds, and price.¹⁹ This example underscores the need for the Commission to be cautious and not take action that will unintentionally undermine the tremendous accomplishments of the unfettered U.S. broadband marketplace.

Against this backdrop, there unquestionably is a serious risk that Title II reclassification would create unnecessary economic disruption and harm. Above all, reclassification increases the risk that the Commission – and, absent preemption,²⁰ possibly scores of state regulatory commissions – might apply onerous Title II requirements to broadband providers that would have a “profoundly negative impact on capital investment.”²¹ To be sure, ISPs would not stop investing *altogether* in network equipment, spectrum, and other inputs for broadband Internet access service if the Commission were to pursue Title II reclassification. But it is clear from the record that Title II reclassification *would* affect the extent to which advanced broadband networks are actually deployed. Most significantly, converting broadband providers into common carriers would risk substantially increasing their cost of capital,²² thus threatening to make network investments more expensive and in some cases potentially cost-prohibitive.²³

¹⁷ Martin H. Thelle & Dr. Bruno Basalisco, Copenhagen Economics, *Europe Can Catch Up with the US: A Contrast of Two Contrary Broadband Models*, at 6 (June 2013), available at <http://www.copenhageneconomics.com/Website/News.aspx?PID=3058&M=NewsV2&Action=1&NewsId=708>.

¹⁸ *Regulatory Mess Hurting Broadband Investment: Consumers and Businesses Stuck in Slow Lane*, European Commission (Aug. 30, 2013), available at <http://europa.eu/rapid/press-release MEMO-13-756 en.htm>.

¹⁹ See Yoo Study at i-ii.

²⁰ See *infra* note 50.

²¹ Craig Moffett, Quick Take – US Telecommunications, U.S. Cable & Satellite Broadcasting: The FCC Goes Nuclear, Bernstein Research (2010).

²² See, e.g., Letter of Matthew A. Brill, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2 (Oct. 2, 2014) (describing investment plans of Mediacom and Suddenlink and explaining that “any effort to reclassify broadband Internet access under Title II would risk impeding [ISPs’] access to the public debt markets (and equity markets), which in turn would jeopardize the scope and timing of such investments”).

²³ See JP Morgan, *Net Neutrality: Updated Thoughts as Title II Looks Like Most Likely Path*, Dec. 4, 2014 (“Moving to Title II would risk chilling carrier investment by increasing their regulatory reporting burden and risk profile for new projects to address a problem that doesn’t seem to exist today, in our view.”); MoffettNathanson, *Net Neutrality and Title II: The Five Stages of Grief*, Nov. 13, 2014 (noting that, if the Commission pursues reclassification, the

Such a result would run directly counter to Congress' instruction to the Commission in Section 706 to “*encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”²⁴ The seriousness of that concern has been heightened by comments from Akamai, Cisco, and dozens of other companies that supply many of the technologies most essential to the Internet ecosystem.²⁵ Particularly given the over \$1 trillion investment that broadband service providers have made in reliance on the Commission's longstanding light-touch regulatory approach and the unparalleled success of America's Internet economy,²⁶ the Commission should not reclassify broadband Internet access services as Title II telecommunications services. Rather, it should preserve the classification of broadband Internet access services as Title I information services and adopt open Internet rules that are very close to those that were adopted in 2010 using its now judicially validated authority under Section 706.

Even apart from these compelling policy reasons to retain the longstanding information service classification of broadband Internet access services, reclassification would undermine the

market would “cut terminal growth assumptions,” and that “stocks have not fallen enough yet to conclude that this risk is appropriately discounted”).

²⁴ 47 U.S.C. § 1302(a) (emphasis added).

²⁵ Cisco has explained that “[r]eclassification would engender regulatory uncertainty, discouraging investment in facilities and stifling the innovation and dynamism that characterizes the broadband Internet market today.” Comments of Cisco Systems, Inc., GN Docket Nos. 14-28, 10-127, at 27 (July 17, 2014). As Akamai put it, “Title II regulation would limit the drive of innovative companies to seek new and creative solutions to industry challenges.” Reply Comments of Akamai Technologies, Inc., GN Docket Nos. 14-28, 10-127, at 4 (Sept. 15, 2014). Less than two weeks ago, no fewer than 60 of America's leading technology companies warned Congress and the Commission that “our companies and our employees – like the consumer, businesses, and public institutions who depend on ever-improving broadband networks – would be hurt by the reduced capital spend in broadband networks that would occur if broadband is classified under Title II.” Letter from ACS Solutions *et al.* to Senate Majority Leader Reid *et al.* (Dec. 10, 2014). And another 100 manufacturing companies recently wrote a letter cautioning policymakers that “proposals to regulate the Internet with early 20th [c]entury-era laws severely threaten continued growth.” Letter from Members of the National Association of Manufacturers to Senate Majority Leader Reid *et al.* (Dec. 10, 2014).

²⁶ See USTelecom, “Broadband Investment,” available at <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>. Notably, the FCC's longstanding classification of broadband Internet access as an information service not only has engendered strong reliance interests but was expressly *intended* to induce substantial investments by broadband providers. See, e.g., *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4789, ¶ 5 (2002) (“[B]roadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.”).

paramount interest in ensuring the adoption of a sustainable open Internet order.²⁷ This is because, as the record persuasively demonstrates, reclassification would be inconsistent with the plain fact that broadband Internet access services retain the technical and functional characteristics that caused the Commission to determine that they were properly classified as Title I information services in 2002 (cable modem service), 2005 (wireline broadband), 2006 (broadband over power lines), and 2007 (wireless broadband). Those characteristics and capabilities include IP address number assignment, domain name resolution through a domain name system, protocol conversion, network security, and caching, as well as e-mail, newsgroup, and webpage-creation services. Indeed, these services have become more “enhanced” than ever – thanks to spam protection, pop-up blockers, and parental controls, along with ISP-provided anti-virus and anti-botnet technologies, cloud-based storage, and protections against denial-of-service attacks.²⁸ Yet another example is the Copyright Alert System, a functionality built into the broadband Internet access services offered by Comcast and other ISPs that, in conjunction with the Motion Picture Association of America, identifies and notifies customers who are alleged to be engaging in online copyright infringement.²⁹ This active monitoring and notification of potential infringement by end users is entirely inconsistent with the conception of an ISP as a passive telecommunications carrier offering only a “transmission” capability to the public.

Congress too has recognized that ISPs offer a functionally integrated information service in a variety of contexts. Section 230 of the Communications Act, which provides immunity from tort and other civil liability for any “provider or user of an interactive computer service” when enabling access to “information provided by another information content provider,”³⁰ expressly characterizes Internet access service as an “information service.”³¹ The statute also permits a “provider” of an “interactive computer service” (that is, an ISP) to impose “good faith” restrictions on access to unlawful content – in a manner that is alien to the notion that ISPs function as purely passive carriers of third-party information.³² And as the statute explains, its

²⁷ See, e.g., Press Release, *FCC Chairman Tom Wheeler’s Statement on President Barack Obama’s Statement Regarding Net Neutrality* (rel. Nov. 10, 2014) (“We must take the time to get the job done correctly, *once and for all*, in order to successfully protect consumers and innovators online.”) (emphasis added) (“Wheeler Nov. 10 Statement”).

²⁸ See, e.g., Comcast Reply Comments at 17-24; Comments of AT&T, GN Docket Nos. 14-28, 10-127, at 49 (July 15, 2014) (“AT&T Comments”); Comments of CTIA – The Wireless Association, GN Docket Nos. 14-28, 10-127, at 44 (July 18, 2014).

²⁹ See Comcast Corp., “New Copyright Alert System,” Apr. 8, 2014, [available at http://customer.comcast.com/help-and-support/internet/copyrightalerts](http://customer.comcast.com/help-and-support/internet/copyrightalerts).

³⁰ 47 U.S.C. § 230(c).

³¹ See *id.* § 230(f)(3) (defining “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, *including specifically a service or system that provides access to the Internet*” (emphasis added)).

³² *Id.* § 230(c)(2).

protections are premised on Congress’s recognition that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”³³ Relatedly, the Digital Millennium Copyright Act shields ISPs from liability in connection with infringing content “residing on systems or networks at [the] direction of users” – a clear indication that Congress viewed Internet access as entailing storage (*e.g.*, caching) and other information-processing functionalities in addition to simple transmission.³⁴

Moreover, since reclassification would “rest[] upon factual findings that contradict those which underlay its prior policy” and depart from “prior policy [that] has engendered serious reliance interests,” the Commission would be required to “provide a more detailed justification” than normal for its change in policy.³⁵ The Supreme Court’s decision in *Brand X* upholding the Commission’s original classification rested on the Commission’s conclusion that, “[s]een from the consumer’s point of view . . . cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access.”³⁶ To change course now, therefore, the Commission must find both that (contrary to earlier findings) consumers do not see the functions that collectively constitute broadband Internet access service as integrated *and* that the benefits of reclassification offset the huge burdens it would impose on broadband providers who relied on prior policy. Neither finding would have support in the administrative record.

Nor could the Commission reasonably *compel* broadband providers to extract the transmission functionality of broadband Internet access service and offer it as a standalone telecommunications service. As a threshold matter, it is far from clear that the Commission actually has statutory authority to force an entity to offer telecommunications on a common carrier basis.³⁷ The Supreme Court in *Midwest Video II* rejected an attempt by the Commission “to compel cable operators to provide common carriage,” holding that such authority “must

³³ *Id.* § 230(a)(4).

³⁴ 17 U.S.C. § 512(c). Moreover, both the Stop Online Piracy Act (“SOPA”) and the Protect IP Act (“PIPA”) would have placed additional burdens on ISPs to prevent their users from accessing copyright infringing content. While those measures were rejected based on legitimate concerns about saddling the Internet industry with overbroad duties and potential liability, the proposed duties underscore that members of Congress continue to view Internet access as more than simply an offer of telecommunications. *See* Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Protect IP Act, S. 968, 112th Cong. (2011).

³⁵ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

³⁶ *NCTA v. Brand X*, 545 U.S. 967, 988 (2005).

³⁷ The Act defines “common carrier” merely as “any person *engaged* as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy.” 47 U.S.C. § 153(11) (emphasis added).

come specifically from Congress.”³⁸ And since the *Midwest Video II* decision, the Commission has never even attempted to compel an information service provider that is not already a common carrier to offer service as such.

Even if the Commission had authority to compel ISPs to offer a standalone telecommunications service on a common carrier basis, to do so for the industry as a whole it would need to find that *all* ISPs have market power³⁹ – a finding the Commission certainly could not make on this record. To the contrary, the facts show that local markets for broadband Internet access service are competitive and growing increasingly more so. According to the Commission’s latest *Internet Access Service Report*, 99 percent of U.S. households are in census tracts where at least two fixed wireline broadband providers offer service, and 86 percent of U.S. households are in census tracts with at least three.⁴⁰ Moreover, roughly 100 percent of U.S. households are in census tracts in which three or more providers (either fixed or mobile) offer service.⁴¹ Multiple recent surveys confirm that consumers across the country view local markets for broadband Internet access service as competitive. For example, a survey by Global Strategy Group found that the vast majority of consumers would readily switch ISPs, including to a DSL or wireless provider with slower speeds, if their provider were to degrade access to edge provider content and streaming video.⁴² Another survey by Consumer Reports found that 71 percent of

³⁸ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979). While some courts have suggested that the Commission may compel service providers to operate as common carriers, *see, e.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976), they may well have assumed in those cases that the provider *already* was offering telecommunications on a standalone basis as a private carrier. Here, however, the record demonstrates that ISPs offer broadband Internet access service only as a functionally integrated information service.

³⁹ *See Virgin Islands Tele. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (noting that the Commission has traditionally asserted authority to compel a private carrier to operate pursuant to Title II only if it “has sufficient market power to warrant regulatory treatment as a common carrier” (quoting *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21589 (1998))).

⁴⁰ *See FCC, Internet Access Services: Status as of December 31, 2013*, at 9, Fig. 5(a) (Oct. 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1016/DOC-329973A1.pdf.

⁴¹ *Id.* at 10, Fig. 5(b).

⁴² According to the Global Strategy Group survey, 82% of respondents would switch ISPs if their provider blocked, degraded, or otherwise slowed access to Internet content, and 79% would switch to a DSL or wireless provider. *See Comcast Corporation, Response to the Federal Communications Commission’s Request for Information Issued to Comcast Corporation on August 21, 2014, as Modified*, at 195-204, Exhibits 74.2, 74.3 (Sept. 11, 2014); *see also Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, Exhibit 1, Reply Declaration of Mark A. Israel, Appendix I, MB Docket No. 14-57* (Sept. 23, 2014).

respondents would switch to an alternative ISP if their provider were to attempt to block, slow down, or charge more for services such as Amazon Instant Video, Netflix, Pandora, and Skype.⁴³ And the competitive options for consumers will only continue to grow as wireline, wireless, and satellite providers all continue to expand and improve their broadband Internet access services, and as new entrants like Google Fiber deploy high-speed broadband networks in a growing number of markets.

At a bare minimum, even if the Commission could assert that market power exists in isolated areas and could seek to justify a compulsion to operate as a common carrier *in those areas*, the record does not support a determination that broadband providers possess market power in all geographic markets across the country and accordingly must operate as common carriers *everywhere*. Any such claim would violate both Commission precedent⁴⁴ and the Administrative Procedure Act.⁴⁵

In short, there is no legally or factually defensible path for the Commission to reclassify broadband Internet access as a Title II telecommunications service – which begs the question why the Commission would even be considering Title II as an option for adopting new open Internet rules. Notably, this proceeding was not launched because the Commission had doubts about the proper characterization of broadband Internet access services, because it had learned something about the provision of such services that changed its prior factual understanding, or because marketplace realities and events had led it to conclude that the service must be provided on a common carrier basis. Indeed, there is no hint of any of these considerations in the NPRM. Instead, Chairman Wheeler’s repeated refrain has been that Title II is simply “on the table” for the sole purpose of justifying open Internet rules⁴⁶ – a mantra that underscores the fact that Title II is under consideration only as a means to achieve a particular *policy* outcome, and not as an effort to properly characterize the “factual particulars” of broadband Internet access service.⁴⁷

⁴³ Glenn Derene, *71% of U.S. Households Would Switch from Providers That Attempt to Interfere with Internet*, Consumer Reports, Feb. 18, 2014, available at <http://consumerreports.org/cro/news/2014/02/71-percent-of-households-would-switch-if-provider-interferes-with-internet-traffic/index.htm>.

⁴⁴ See *supra* note 39.

⁴⁵ See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency decision is arbitrary and capricious where the agency has failed to “articulate a satisfactory explanation for its action including ‘a rational connection between the facts found and the decision made’”) (internal citations omitted).

⁴⁶ See, e.g., Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules, Feb. 19, 2014, at 2, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-325654A1.pdf; Wheeler Nov. 10 Statement at 1.

⁴⁷ Given that Title II is neither necessary nor even useful for achieving strong net neutrality rules, including an outright ban on paid prioritization, there is not a reasonable *policy* justification for Title II reclassification. See Comcast Comments at 50-54; Comcast Reply Comments at 30-32. Free Press and others have argued that Title II reclassification would enable

Courts have made clear that the Commission may not “impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance.”⁴⁸ That the President’s endorsement of Title II appears to be driving the Commission’s interest in reclassification only compounds this risk. Indeed, in *Fox*, in response to the claim that independent agencies’ insulation from political oversight requires courts to be extra vigilant in ensuring that major policy decisions are justified, the Court defended the deference that ordinarily is accorded on the ground that “agencies are sheltered not from politics but *from the President*.”⁴⁹ Here, the President’s direct influence on the administrative process – which undermines the usual insulation of an “independent” agency from the Executive Branch – would accordingly increase the risk that reclassification would be considered arbitrary and capricious.⁵⁰

the Commission to regulate broadband retail rates, usage-based pricing, and other issues that the Commission has repeatedly viewed as outside the scope of its open Internet initiatives, but those are not even legitimate policy goals in this proceeding. *See 2010 Open Internet Order* ¶ 72 (declining to extend open Internet rules to retail billing issues, including usage-based pricing); *id.* ¶ 67 n.209 (declining to extend open Internet rules to “interconnection” issues).

⁴⁸ *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (holding that the Commission may not confer common carrier status “depending on the regulatory goals it seeks to achieve”).

⁴⁹ *Fox*, 556 U.S. at 523 (emphasis added).

⁵⁰ If the Commission were to seek reclassification under Title II, it should reaffirm that broadband Internet access service is an *interstate* service and that state regulation is therefore preempted. The Commission has long viewed Internet access service as inherently interstate, based on its finding that the service involves “a substantial portion of Internet traffic . . . accessing interstate or foreign websites.” *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, ¶ 18 (1999)); *see also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 59 (2002) (holding that cable modem service is “properly classified as interstate” based on an “end-to-end analysis . . . of the location of the points among which cable modem service communications travel” – points that “are often in different states and countries” (internal quotation marks and citations omitted)). Notably, even before the Commission classified DSL service as an information service, it recognized that the service was properly classified as interstate, and that such interstate DSL services were subject to exclusive federal jurisdiction. *See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 1 (1998) (concluding that ADSL service, “which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service”). There is no basis in the record to depart from that historical understanding. To the contrary, even Free Press concedes that broadband Internet access is jurisdictionally interstate. *See Letter of Matthew*

II. If the Commission Decides to Reclassify Broadband Internet Access Service as a Telecommunications Service, It Simultaneously Must Grant Broad Forbearance Relief from Title II.

If the Commission persists in pursuing reclassification despite the serious policy concerns and legal risks outlined above, it should mitigate the associated harms as much as possible by coupling Title II reclassification with broad forbearance from all Title II restrictions and obligations. In particular, the Commission should expressly forbear from applying any of the *substantive* requirements of Title II, including Sections 201 and 202, to the newly reclassified service or the providers that offer it, relying instead on its Section 706 authority to promulgate the three rules that the Chairman has said are needed⁵¹ – and which the *Verizon* court said Section 706 would support for entities classified as common carriers.⁵²

The Commission previously considered the appropriate approach to forbearance for broadband Internet access services and concluded that broad relief from Title II would be necessary if the service were reclassified, in order to avoid imposing undue burdens on a service that has always been subject to light-touch regulation, and to reduce the chilling effect of potential common carrier regulation. And it did so even before the *Verizon* court had clearly recognized the agency’s authority under Section 706. Accordingly, the Commission’s previous analysis should apply all the more forcefully and broadly now.

In the 2010 Notice of Inquiry that presented the so-called “Third Way” proposal for open Internet regulations, the Commission observed that the “forbearance analysis [for broadband] has a different posture” than telephone companies’ requests for relief from legacy regulations, as the agency “would not be responding to a carrier’s request to change the legal and regulatory framework that currently applies.”⁵³ Rather, the Commission’s task would be to determine “whether to forbear from provisions of the Act that, because of our information service

Wood, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-27, at 5-6 (Dec. 15, 2014).

⁵¹ See Letter of Chairman Wheeler to Congressman Henry Waxman (Nov. 19, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1204/DOC-330839A1.pdf (“[T]here are three bright lines for any open Internet rules: no blocking, no throttling, and no fast lanes.”).

⁵² The anti-discrimination and anti-blocking rules were invalidated “[b]ecause the Commission has failed to establish that the[y] . . . do not impose *per se* common carrier obligations[.]” *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). This deficiency was directly rooted in “the Commission’s still-binding decision to classify broadband providers not as providers of ‘telecommunications services’ but instead as providers of ‘information services[.]’” *Id.* at 650. While the court’s concerns can and should be addressed in other ways, reclassification allows for reinstatement of the prohibitions against blocking and unreasonable discrimination pursuant to Section 706 and would allow the Commission to explicitly address paid prioritization as well.

⁵³ *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866, ¶ 70 (2010) (“*Third Way NOI*”).

classification, do not apply at the time of the analysis.”⁵⁴ Noting that prior “Commission decisions classifying broadband Internet service did not rely on any particular, defined geographic area,” the Commission proposed to forbear from all but a handful of Title II provisions on a nationwide basis in order to “maintain a deregulatory status quo for . . . broadband Internet service[.]”⁵⁵

The then-FCC General Counsel characterized this proposal aptly:

The upshot is that the Commission is able to tailor the requirements of Title II so that they conform precisely to the policy consensus for broadband transmission services. Specifically, the Commission could implement the consensus policy approach . . . by forbearing from applying the vast majority of Title II’s 48 provisions to broadband access services.⁵⁶

Similarly, Commissioner Clyburn characterized the “entire point” of the Commission’s proposal as avoiding the application of “old-world rules,” noting that: “[W]ithout forbearance there is no reclassification. . . . Think peanut butter and jelly. Salt and pepper. Batman and Robin.”⁵⁷

The Commission’s position in 2010 was consistent with the views it expressed eight years earlier. In 2002, the Commission tentatively concluded that cable modem service should be subject to blanket forbearance from Title II in the event it was classified as a telecommunications service.⁵⁸ The Commission specifically noted that “the public interest

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 73. The Commission has distinguished instances in which it applied a more focused forbearance analysis. For example, in setting forth the very granular analysis in the *Qwest Phoenix Order*, the Commission explicitly acknowledged that “a different analysis may apply when the Commission addresses advanced services, such as broadband services, instead of a petition addressing legacy facilities such as Qwest’s petition in this proceeding.” *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, ¶ 39 (2010) (“*Qwest Phoenix Order*”) (subsequent history omitted). And in the *Third Way NOI*, the Commission acknowledged that “[S]ection 10 requires no ‘particular . . . level of geographic rigor,’ and the Commission has flexibility to adopt an approach suited to the circumstances.” *Third Way NOI* ¶ 73 (internal citations omitted).

⁵⁶ “A Third-Way Legal Framework for Addressing the Comcast Dilemma,” Austin Schlick, FCC General Counsel, at 4 (May 6, 2010).

⁵⁷ “Broadband Authority and the Illusion of Regulatory Certainty,” Prepared Remarks of Commissioner Mignon L. Clyburn, Media Institute Luncheon, at 2 (June 3, 2010) (emphasis added).

⁵⁸ *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff’d sub. nom. NCTA v. Brand X*, 545 U.S. 967 (2005).

would be served by the uniform national policy” that the broad grant of forbearance to cable modem service would produce.⁵⁹

Earlier still, in determining that it should forbear from applying the tariffing and other core requirements of Title II to Commercial Mobile Radio Service (“CMRS”) providers pursuant to Section 332 of the Communications Act, the Commission stressed that forbearance would promote robust competition among CMRS providers by shielding them from the economically harmful effects of unnecessary Title II regulation.⁶⁰ The Commission noted, for example, that requiring CMRS providers to comply with the tariffing requirements of Title II likely would have substantial anti-competitive effects. Specifically, tariffing would: (1) interfere with “rapid, efficient responses to changes in demand and cost, and remove incentives for carriers to introduce new offerings”; (2) “impede and remove incentives for competitive price discounting”; and (3) “increase rates for consumers.”⁶¹ Similarly, the Commission found that enforcing the entry and exit certification requirements of Section 214 could “actually deter entry of innovative and useful services.”⁶² In short, the Commission recognized that forbearance would strongly *advance* the expansion of competition and related consumer benefits, given that traditional common carrier obligations threaten to impede investment and innovation and thereby undermine the public interest when applied to competitive industries.

History has shown that the Commission’s broad exercise of its forbearance authority – *together with preemption of state authority and a strong presumption in favor of market-based policies more generally* – was a key factor in jumpstarting the rapid development of mobile services in the United States, allowing the CMRS marketplace to become an intensely competitive, innovative industry. Indeed, four years after adopting the *CMRS Forbearance Order*, the Commission observed that its grant of forbearance “contributed significantly to the impressive growth of competition in CMRS markets.”⁶³

But the success of the CMRS industry cannot solely be attributed to the initial decision to forbear from most of Title II. Equally if not more importantly, the wireless industry flourished because of the broad deregulatory posture the Commission took toward the sector in the ensuing decades. The Commission generally refrained from imposing prescriptive regulation on CMRS providers and shielded those providers from common-carrier-style oversight in order to foster

⁵⁹ *Id.* ¶ 95.

⁶⁰ *See generally Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994) (“*CMRS Forbearance Order*”).

⁶¹ *Id.* ¶ 177.

⁶² *Id.* ¶ 182.

⁶³ *See Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 8 (1998).

competition. In fact, the Commission expressly disclaimed a desire to engage in *post hoc* second-guessing of the rates or terms offered by CMRS providers.⁶⁴

While instructive, the CMRS example is, therefore, not entirely dispositive, because it is unclear whether the FCC intends to adopt that same deregulatory posture toward broadband Internet access services. And, to be sure, at no point has the appetite to regulate the CMRS marketplace been as voracious as recent calls from some sectors to regulate the Internet. Simply stated, the CMRS model cannot, in and of itself, foretell the impact that regulation under a limited Title II regime (as opposed to full forbearance) would have on the broadband Internet access services marketplace. The only way the Commission can ensure a comparable deregulatory outcome is to forbear from applying Title II's restrictions and obligations in full.

No situation could better justify full use of the Commission's sweeping forbearance authority than the situation at hand. Indeed, there is broad consensus on the need for significant forbearance if reclassifying the regulatory status of broadband Internet access service.

The *Verizon* court recognized that Section 706 "furnishes the Commission with the requisite affirmative authority" to adopt the very rules it promulgated in 2010, including outright prohibitions against blocking, discrimination, and paid prioritization, so long as the regulated entities are *classified* as common carriers.⁶⁵ The Court certainly did not require active *regulation* under Title II as a prelude for this use of Section 706. The Commission thus need only reclassify and then rely exclusively on Section 706 to adopt net neutrality rules that prohibit the key "unjust and unreasonable" conduct that is the focus of the Commission's longstanding net neutrality proceeding: blocking, unreasonable discrimination, and paid prioritization.

And indeed, Chairman Wheeler has stated that the *sole* purpose of reclassifying broadband Internet access service would be to adopt open Internet protections, not to impose the panoply of Title II requirements that were designed to regulate monopoly telephone carriers. In particular, Chairman Wheeler stressed that the Commission's "goal [is] simple: to reach the outcomes sought by the 2010 rules."⁶⁶ President Obama likewise grounded his support for Title II reclassification in his desire to "create a new set of rules protecting net neutrality," and he noted that, "[i]f the FCC appropriately forbears from the Title II regulations that are not needed . . . [,] it will help ensure new rules are consistent with incentives for further investment in the infrastructure of the Internet."⁶⁷

⁶⁴ See *Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless*, Memorandum Opinion and Order, 17 FCC Rcd 8987, ¶ 18 (2002) (explaining that, given "the existence of robust competition in the CMRS market," "the Commission has regulated CMRS 'through competitive market forces'" (internal citations omitted), *aff'd*, *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (affirming Commission's decision not to apply Section 202 to require Verizon to offer the same terms to all similarly situated customers).

⁶⁵ *Verizon*, 740 F.3d at 635.

⁶⁶ Wheeler Nov. 10 Statement.

⁶⁷ Obama Nov. 10 Statement.

Leading congressional proponents of reclassification also have stressed the need for broad forbearance. Congressman Waxman has urged the Commission to “forbear from applying most of the provisions of Title II to broadband providers,” including Sections 201 and 202.⁶⁸ Congresswoman Eshoo also has stated that she does not “support heavy-handed regulation and it is not called for,” noting that the Commission has the “ability to tailor the law for market circumstances, deciding when and where to forbear from certain rules when those requirements are no longer necessary to protect the public.”⁶⁹

Even the most vocal proponents of reclassifying broadband as a telecommunications service have acknowledged that broad forbearance is appropriate. A leading representative of Public Knowledge, for example, has stated that granting forbearance for broadband providers would be “easy peasy” because it would not “require an exacting standard of evidence on a market-by-market basis.”⁷⁰ Netflix went further, indicating that, because “[o]pen Internet rules under Title II need go no further than the basic tenets laid down by the Commission in 2010,” Title II “does not mean more regulation.”⁷¹ Free Press likewise has indicated that “[t]here should be no doubt” that imposition of common carriage would “maintain the current deregulatory status quo,” citing the nationwide forbearance granted to CMRS providers as a template that could be applied in this case.⁷²

⁶⁸ Letter from Congressman Henry A. Waxman to Chairman Wheeler, GN Docket No. 14-28, at 12 (Oct. 3, 2014) (“Waxman Letter”).

⁶⁹ Letter from Congresswoman Anna G. Eshoo to Chairman Wheeler, GN Docket No. 14-28 (Oct. 22, 2014); *see also* John Eggerton, *Eshoo: FCC Can Find Title II-Lite Solution*, Multichannel News, Sept. 10, 2014, *available at* <http://www.multichannel.com/news/national-regulation/eshoo-fcc-can-find-title-ii-lite-solution/383720> (reporting on interview in which Rep. Eshoo voiced support for forbearing from all of Title II except for Section 202(a)). *See also*, *e.g.*, Letter from Senator Ron Wyden to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly, GN Docket No. 14-28, at 2 (Sept. 15, 2014) (“Congress acted in the 1996 Telecommunications Act to ensure that the FCC has discretion to forbear from applying all but the few Title II provisions needed to do to the job. And there is broad consensus that the FCC would only need to apply a handful of Title II provisions in order to preserve an open Internet.”); Letter from Representative Zoe Lofgren to Chairman Wheeler, GN Docket No. 14-28, at 1-2 (Oct. 8, 2014) (“It is true that reclassifying all broadband Internet access services as title II services is not without some concern, which is why it should be done as narrowly – with as much restraint as possible – and solely to accomplish the goals of net neutrality[.]”).

⁷⁰ *See* Harold Feld, *Forbearance Redux—Still Easy Peasy*, WetMachine, Oct. 2, 2014, <http://www.wetmachine.com/tales-of-the-sausage-factory/forbearance-redux-still-easy-peasy/>.

⁷¹ Comments of Netflix, Inc., GN Docket Nos. 14-28, 10-127, n.42 (July 15, 2014).

⁷² Comments of Free Press, GN Docket Nos. 14-28, 10-127, at 42-44, 46 (July 17, 2014). At least insofar as cable broadband is concerned, Free Press’s notion of a “return to common carrier regulation” is utterly unfounded; the Commission has *never* applied common carrier regulation to cable broadband.

Notably, key proponents of reclassification appropriately recognize that broad forbearance must include forbearance from Sections 201 and 202 of the Act. For example, President Obama’s call for reclassification specifically urged “forbearing from rate regulation and other provisions less relevant to broadband services,”⁷³ and rate regulation is, of course, a central component of Section 201(b).⁷⁴ Congressman Waxman was even more explicit, urging the Commission to forbear from “[S]ections 201 and 202,” because doing so will both “help assure broadband providers that the Commission does not plan to regulate the rates of broadband Internet access service” and “avoid the Title II precedents that were initially developed for regulation of telephone services.”⁷⁵ As he further explained,

[F]orbearance would be justified because the no blocking, no throttling, and no paid prioritization rules promulgated under [S]ection 706 would render the Title II provisions unnecessary. Section 706 gives the FCC a broad canvas for writing rules that protect the open Internet and its virtuous circle of innovation and investment. Once the FCC has exercised that authority, further regulation under most of the provisions of Title II would be duplicative at best. Reinstating open Internet protections without relying on [S]ections 201 and 202 also advances the “virtuous circle” that accelerates broadband deployment because it avoids the specter of price regulation under Title II that critics argue could stifle broadband investment.⁷⁶

Thus, Sections 201 and 202 not only are unnecessary in the broadband arena, but also would be affirmatively harmful. Although Congress did not authorize the Commission to forbear from the application of Sections 201 and 202 to CMRS providers in Section 332, it *did* provide that authority in Section 10 of the Act. The Commission should employ that authority here, as shielding broadband providers from the intrusive dictates of Sections 201 and 202 is necessary to promote the broadband deployment and adoption goals embodied in Section 706 and in the Commission’s National Broadband Plan.⁷⁷

⁷³ Obama Nov. 10 Statement.

⁷⁴ See 47 U.S.C. § 201(b) (“All *charges*, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such *charge*, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]”) (emphasis added).

⁷⁵ Waxman Letter at 12.

⁷⁶ *Id.* at 12-13 (footnote omitted).

⁷⁷ See Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xi, 5 (2010) (stating the Commission’s goal of ensuring that “every American has access to broadband capability,” and finding that “the American broadband ecosystem has evolved rapidly,” and that this evolution has been “[f]ueled primarily by private sector investment and innovation” with “limited government oversight” (internal quotation marks and citations omitted)).

If the Commission were to depart from these proposals and decline to forbear from Sections 201 and 202, it would retain sweeping authority over all “charges, practices, classifications and regulations” of broadband providers – authority far beyond the purposes of this proceeding.⁷⁸ These provisions have provided the legal underpinnings for some of the most muscular regulatory measures in the Commission’s history, including establishing a rate-of-return regime for AT&T and the associated Bell System companies,⁷⁹ imposing unbundling and structural separation requirements on AT&T and GTE’s provision of enhanced services,⁸⁰ establishing a comprehensive access charge regime to determine the rates interexchange carriers pay for access to local telephone company facilities used to complete interstate service offerings,⁸¹ creating a system of “price cap” regulation to govern the rates of the largest incumbent LECs,⁸² and establishing physical and virtual collocation requirements for certain incumbent LECs.⁸³ Not even the most zealous of net neutrality proponents is currently proposing that anything remotely akin to these requirements be applied to broadband Internet access services. But retaining Sections 201 and 202 would leave the door open to precisely these kinds of heavy-handed regulations – including *price regulation*, notwithstanding any effort to forbear from statutory tariffing duties under Section 203.⁸⁴

To avoid the risk of “regulatory overhang” that could easily discourage the investment needed to ensure continued deployment of advanced broadband services throughout the nation,⁸⁵

⁷⁸ See 47 U.S.C. §§ 201(b), 202(a).

⁷⁹ See *American Telephone & Telegraph Co. and the Associated Bell System Companies Charges for Interstate and Foreign Communication Service; American Telephone & Telegraph Co. Charges, Practices, Classifications, and Regulations for and in Connection with Teletypewriter Exchange Service*, Interim Decision and Order, 9 FCC 2d 30, ¶ 239 (1967)

⁸⁰ See *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384, ¶¶ 229-30, 239-40 (1980) (subsequent history omitted).

⁸¹ See *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, ¶ 10 (1983).

⁸² See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶¶ 1-6 (1990).

⁸³ *Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992), vacated *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994); *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, 9 FCC Rcd 5154, ¶ 3 (1994).

⁸⁴ 47 U.S.C. § 203.

⁸⁵ As Citicorp Chairman and CEO Walter Wriston observed, “Capital goes where it is welcome and stays where it is well treated.” See Rich Karlgaard, *Capital Goes Where It’s Welcome*, *Forbes* (May 18, 2009), available at <http://www.forbes.com/sites/digitalrules/2009/05/18/capital-goes-where-its-welcome/>.

it is essential that the Commission take the necessary action at this time to make it clear that it has no intention of imposing these sorts of regulations on broadband Internet access services. The only way to do so is to forbear from all requirements imposed under Title II, including Sections 201 and 202.

III. The Commission Has Authority Under the Communications Act to Grant Broadband Internet Access Service Providers Broad Forbearance Relief on a Nationwide Basis.

The Commission has expansive authority pursuant to Section 10 to grant immediate nationwide forbearance from Title II for broadband Internet access services.⁸⁶ Indeed, “Congress enacted Section 401 of the 1996 Act, adding Section 10 to the Communications Act” to give the Commission “express authority to eliminate unnecessary regulation and to carry out the pro-competitive, deregulatory objectives that it pursued in the *Competitive Carrier* proceeding for more than a decade.”⁸⁷ As explained above, there can be little doubt that granting forbearance from all provisions of Title II that impose, or could be used to impose, obligations and restrictions on broadband Internet access services would be pro-competitive and otherwise would advance the public interest.

The Commission’s approach to granting nationwide, broad forbearance from Title II to CMRS providers furnishes a useful starting point for its approach to relieving broadband providers of Title II obligations.⁸⁸ Like the broadband industry, the commercial mobile radio business had not previously been subject to the traditional obligations imposed by Title II. The Commission concluded, therefore, that CMRS providers should be granted nationwide forbearance from key Title II provisions pursuant to a streamlined framework.⁸⁹ Notably, the Commission decided not to analyze the CMRS marketplace on a granular, geographic-area-by-geographic-area basis. Instead, the Commission examined competitive conditions at a national

⁸⁶ While Free Press has suggested that the Commission could “stay[]” the enforcement of certain Title II provisions without actually granting forbearance pursuant to Section 10, it has not articulated a coherent legal theory for its proposal and, in any event, its approach would create needless uncertainty. See Letter from Matthew F. Wood, Policy Director, Free Press, to Marlene H. Dortch, FCC Secretary, GN Docket Nos. 14-28, 10-127 (Nov. 21, 2014). Notably, if the Commission can justify “temporary” forbearance on the ground that enforcement of a provision is not currently necessary, then it is *required* to forbear without any temporal restriction under the plain language of Section 10. See 47 U.S.C. § 160(a) (providing that the Commission “*shall* forbear” where the statutory factors are satisfied (emphasis added)).

⁸⁷ *Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Order on Reconsideration, 12 FCC Rcd 15014, ¶¶ 11, 13 (1997).

⁸⁸ See generally *CMRS Forbearance Order*.

⁸⁹ *Id.*

level and concluded that the CMRS industry was sufficiently competitive to justify a broad, nationwide grant of forbearance from the tariffing and other core requirements of Title II.⁹⁰

It bears emphasis that the Commission reached this conclusion while acknowledging that incumbent CMRS providers might possess market power in specific individual local geographic markets. In particular, the Commission stated that “the record does not support a conclusion that cellular services are fully competitive.”⁹¹ The Commission also acknowledged the possibility that “duopoly [incumbent cellular] providers [would be] able to reach an implicit or explicit agreement not to compete vigorously with one another and thus to elevate rates above their competitive levels.”⁹² Nevertheless, it concluded that “the current state of competition regarding cellular service does not preclude our exercise of forbearance authority.”⁹³

The case for granting broadband Internet access service providers nationwide, streamlined forbearance from Title II is even more compelling than it was for CMRS providers, as the Commission implicitly recognized in the *Third Way NOI*. In contrast to the concerns expressed by the Commission about the competitiveness of certain local cellular geographic areas, the evidence of the robust competitiveness and dynamism of the broadband marketplace is overwhelming – there is intense rivalry between cable and telco wireline broadband services; high-speed (and ever-faster) wireless broadband services are almost universally available from multiple carriers and rapidly have amassed tens of millions of customers; and additional options continue to develop in the form of satellite broadband, overbuilders like Google Fiber, and fixed wireless services.

Importantly, the Commission has broader legal authority to grant forbearance pursuant to Section 10 than it did pursuant to Section 332 in the CMRS context. As explained above, Section 332 expressly barred the Commission from forbearing from enforcing Sections 201, 202, and 208 of the Act. Two years after the FCC granted forbearance to CMRS providers, Congress adopted Section 10, which empowers the Commission to forbear from enforcing *any* of the provisions of Title II.⁹⁴ With the clear benefit of hindsight from the Commission’s CMRS

⁹⁰ *Id.* ¶¶ 135-54, 272.

⁹¹ *Id.* ¶ 138.

⁹² *Id.* ¶ 146.

⁹³ *Id.* ¶ 138.

⁹⁴ *Compare* 47 U.S.C. § 332(c)(1) *with id.* § 160. Notably, in the deliberations preceding the enactment of the 1996 Act, the House and Senate initially took different approaches to the drafting of the forbearance provision. The House bill did not allow for forbearance from Sections 201, 202, and 208 (as well as two other sections). The Senate bill contained no such restrictions. The Conference Committee chose the Senate approach, making it clear that the Commission’s forbearance authority applies to “*any* provision of the Communications Act or . . . *any* of its regulations” applicable to a telecommunications carrier or telecommunications service. H.R. Rep. No. 104-458, at 184-185 (1996) (emphasis added). The Conference Committee approach was subsequently approved by both the House and the Senate and was signed into law by the President. Notably, Section 10 *does* limit the FCC’s authority to forbear from Sections

forbearance experience, Congress recognized that there would be circumstances in which enforcement of Sections 201, 202, and 208 would no longer be necessary or in the public interest.⁹⁵

The Commission’s proposal to reclassify broadband Internet access service presents just such a case. The experience of the past ten-plus years has shown that the requirements and restrictions contained in those statutory provisions are not needed to protect consumers. To the contrary, declining to grant full Title II forbearance would actually undermine the Commission’s public policy goals, resulting in harm to both competition and consumers. In particular, attempting to impose Sections 201 and 202 on broadband Internet access service providers

251(c) and 271, both adopted as part of the 1996 Act, by requiring that they first be “fully implemented.” 47 U.S.C. § 160(d). The fact that Section 10 expressly addresses those provisions but *not* Sections 201 and 202 only underscores that Congress intended for the Commission to forbear from Sections 201 and 202 where, as here, the statutory criteria are met. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2002) (“Where Congress explicitly enumerates certain exceptions to a general [rule], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” (internal quotation marks and citations omitted)).

⁹⁵ To be sure, the Commission later entertained a request from PCIA to grant forbearance from Sections 201 and 202 to CMRS providers under the broader authority contained in Section 10 of the Act—a request the Commission ultimately denied. *See Personal Communications Industry Association’s Petition for Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 ¶¶ 15-31 (1998) (“1998 PCIA Order”). But as noted above, the case for forbearance from those provisions in the open Internet context is far stronger than it was in the CMRS context in 1998. First, unlike CMRS providers, which by 1998 had been subject to Sections 201 and 202 for several years, broadband providers have *never* been subject to those provisions, and the result has been an unprecedented level of investment delivering constantly improving speeds at declining per-Mbps rates to consumers. *See supra* at 4-6. Indeed, to the extent the 1998 PCIA Order and later orders suggest some inherent difficulty in granting forbearance from Sections 201 and 202, those orders all came in the context of a request from a provider that was already subject to those provisions. *See 1998 PCIA Order* ¶ 19; *see also, e.g., Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361 ¶ 17 (2005). By contrast, forbearance in the open Internet context would aim to avoid subjecting broadband providers to Title II’s restrictions and obligations – including Sections 201 and 202 – for the very first time. In these circumstances, there is no logical basis for requiring some heightened showing for forbearance from some provisions of Title II as opposed to others; if anything, the Commission’s affirmative obligation under Section 706 to use “forbearance” to promote broadband deployment and adoption demonstrates the heightened need for more expansive relief from Title II in the broadband context. 47 U.S.C. § 1302(a). And in all events, the Commission’s confirmed authority under Section 706 to protect and promote Internet openness provides a crucial regulatory backstop that is entirely absent in the CMRS context, and that eliminates any need for Sections 201 or 202 as statutory authority for such regulation. *See infra* at 24-25; *cf. 1998 PCIA Order* ¶ 15 (characterizing Sections 201 and 202 as the sole bases for “consumer protection obligations” in the CMRS context).

would affirmatively harm consumers by diminishing investment in the broadband marketplace and saddle a thriving ecosystem with regulatory doubt and risk – an outcome that would slow the speed at which future pro-consumer benefits are realized.⁹⁶

Section 706 expressly instructs the Commission to use “regulatory forbearance” to promote broadband deployment and adoption goals.⁹⁷ Not only does this mandate “inform[]” the “public interest” prong of the forbearance test under Section 10, as the Commission has explained,⁹⁸ but it also affirmatively *requires* the Commission to grant forbearance when doing so would advance the goals of Section 706.

IV. Comprehensive Relief from Title II Is Warranted Under the Criteria Set Forth In Section 10 of the Act.

Congress gave the Commission expansive forbearance authority in Section 10 to free service providers from the substantive obligations of Title II when those requirements are no longer necessary to protect consumers or advance the public interest goals of the Act. Congress implicitly recognized that, once the traditional monopoly paradigm in the communications industry had been replaced by the competitive model mandated by the 1996 Act, Title II regulations may become not only unnecessary but may be affirmatively harmful to consumers and competition.⁹⁹

⁹⁶ As discussed above, the Commission has relied on Sections 201 and 202 in the past to adopt price controls and other substantive economic regulations governing Title II carriers. *See supra* at 19.

⁹⁷ 47 U.S.C. § 1302(a).

⁹⁸ *Verizon Telephone Companies Forbearance from Section 271 Unbundling Requirements, et al.*, Memorandum Opinion & Order, 19 FCC Rcd 21496, ¶ 34 (2004).

⁹⁹ The Commission itself has reached the same conclusion in earlier proceedings. In the early 1980s, for example, the Commission sought to prohibit emerging rivals of AT&T in the increasingly competitive long-distance business from tariffing their service offerings. The Commission found that the continued use of tariffs by MCI and other non-dominant carriers would actually dampen competitive incentives by: “(1) taking away carriers’ ability to make rapid, efficient responses to changes in demand and cost; (2) impeding and removing incentives for competitive price discounting; (3) imposing costs on carriers that attempt to make new offerings; and (4) increasing the costs of the Commission’s operations.” *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 FCC 2d 1020, ¶ 13 (1985); *see also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554, ¶¶ 5, 31 (1983). The Court of Appeals subsequently concluded that the Commission did not have authority under its pre-1996 Act enabling statute to forbear from enforcing the tariff requirement. *See MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). Congress addressed this problem by enacting Section 10.

The broadband industry, of course, has never been subject to the Title II monopoly paradigm and always has been controlled by competitive forces. Indeed, in view of the broadband industry’s long history of delivering higher speeds, greater value, and more choices to consumers, along with the Commission’s proposed safeguards, the forbearance analysis under Section 10 should be straightforward and readily demonstrate that no Title II requirements should be imposed on broadband Internet access service providers. The competitive conditions in today’s broadband marketplace, which is free of obligations imposed pursuant to Title II, are even more compelling than those that warranted forbearance from much of Title II in other circumstances.

First, given that the broadband marketplace has been functioning well without Title II regulation, it is clear that “applying any regulation or provision of” Title II is not “necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with” broadband Internet access services “are just and reasonable and are not unjustly or unreasonably discriminatory.”¹⁰⁰ Consistent with the precedent established in granting forbearance relief to the CMRS industry, the Commission should forbear on a nationwide basis from enforcing Title II against broadband Internet access providers. As noted previously, today’s broadband marketplace is demonstrably more competitive and robust than the CMRS industry was in 1994, and Section 706 provides a regulatory “backstop” that the Commission did not possess in the case of CMRS.

Second, it cannot be said that enforcement of any Title II provision or regulation is “necessary for the protection of consumers.”¹⁰¹ To the contrary, consumers have reaped tremendous benefits absent any Title II regulation of broadband Internet access service. Nor have there been any cognizable harms that Title II—and Sections 201 and 202 in particular—would be “necessary” to address. The Commission, therefore, should find that the competitive dynamics of today’s broadband industry, coupled with the open Internet principles under consideration in this proceeding, will ensure that the interests of consumers are protected.

Here, too, Section 706 provides the Commission with the authority to address any consumer protection concerns that may arise in the future. Indeed, the only *hypothetical* harms identified in the NPRM would be addressed by the open Internet rules that the NPRM proposed to adopt under Section 706, and the record in this proceeding contains a variety of proposals offered by Comcast and other parties for implementing safeguards under that authority without the need to reclassify broadband Internet access service.¹⁰² In the event, however, that the Commission were to reclassify broadband as a telecommunications service, that decision would preclude any challenge to the adoption of open Internet safeguards under Section 706 on the ground that they imposed impermissible common carrier obligations on broadband providers.

¹⁰⁰ 47 U.S.C. § 160(a)(1).

¹⁰¹ *Id.* § 160(a)(2).

¹⁰² *See, e.g.*, Comcast Comments at 13-14, 24; Comments of the National Minority Organizations, GN Docket Nos. 14-28, 10-127, at 11 (July 15, 2014); AT&T Comments at 37-38.

Further, to the extent that any credence is given to speculation about the risk of consumer harm, based on isolated incidents that occurred years ago, the rules the Commission has proposed to adopt in this proceeding will fully address such concerns.

Third, “forbearance from applying [any] such provision or regulation [to broadband Internet access service providers] is consistent with the public interest.”¹⁰³ Just as the absence of Title II regulation of broadband Internet access services has created a heterogeneous, dynamic, and competitive broadband marketplace, continued forbearance from Title II regulation will “promote [continued] competition among providers of telecommunications services.”¹⁰⁴ There simply is no reason to saddle a marketplace that already functions in a manner that advances the public interest with the costs and unanticipated consequences of Title II regulation. Indeed, Congress has recognized that the Internet has “flourished, to the benefit of all Americans, with a minimum of government regulation”¹⁰⁵ and has codified its policy “to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation.”¹⁰⁶ Accordingly, the Commission should conclude that forbearance will foster the robust competitive dynamism that has characterized the broadband industry over the past decade.

In sum, the record in this proceeding and the Commission’s precedent plainly support a broad, nationwide grant of forbearance from Title II to maintain the light-touch regulatory *status quo*. To that end, broadband Internet access services and those who provide them should be afforded relief from all provisions of Title II that impose, or could be used to impose, obligations and restrictions.¹⁰⁷ The Commission will, of course, be adopting several bright-line open Internet rules, but in so doing it must not expose the industry to a wide range of other potential obligations and restrictions that not only are needlessly burdensome, but also undermine competition and investment in the broadband industry and the accompanying consumer benefits.

* * *

¹⁰³ 47 U.S.C. § 160(a)(3).

¹⁰⁴ See *id.* § 160(b); see also, e.g., *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, Memorandum Opinion and Order, 22 FCC Rcd 19478, ¶ 46 (2007) (finding that forbearing from applying Title II’s dominant carrier regulations to Embarq’s non-TDM-based, packet-switched and optical transmission services, which were subject to competitive forces, would “enhance competition among providers”).

¹⁰⁵ 47 U.S.C. § 230(a)(4).

¹⁰⁶ *Id.* § 230(b)(2).

¹⁰⁷ Other sections of Title II, however, provide rights and protections to broadband providers today, and reclassification should not result in the loss of those safeguards. See, e.g., *id.* § 224 (pole attachments); *id.* § 230 (protection for private blocking and screening of offensive material); see also Letter of Matthew A. Brill, Counsel for NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 21-22 (Dec. 23, 2014).

The *Verizon* decision affirmed the Commission's authority under Section 706 to adopt strong net neutrality rules and to promote the public interest objective of expanded deployment. Consequently, there is no need for the Commission to pursue the risky and destabilizing alternative of reclassifying broadband Internet access under Title II, and certainly no need to retain any of the obligations or restrictions codified in Title II in the event of reclassification.

Respectfully submitted,

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